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Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court

Jonathan M.H. Short
William and Mary School of Law

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SEXUAL VIOLENCE AS GENOCIDE: THE DEVELOPING LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

*Jonathan M.H. Short**

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INTRODUCTION

Although critics differ in interpreting the type of correlation¹ between sexual violence and armed conflict, such atrocities appear in times of struggle with seeming inevitability. In recent conflicts, sexual violence has taken on a new purpose: ethnic cleansing or genocide.² While the

* J.D. 2003, William and Mary School of Law; A.B. 2000, Bowdoin College.

1. Critics differ as to whether sexual violence is a means, result, or goal of armed conflict.

2. Ethnic cleansing is a term of modern adaptation; it is the zero-sum game of genocide. Ethnic cleansing is accomplished, for example, by removing individuals of a certain national, ethnical, racial, or religious group from a community or region. The gain of the perpetrating group is measured by the loss to the victimized group. Two recent examples of this are the conflicts in Yugoslavia (Serbian v. Non-Serbian) and Rwanda (Hutu v. Tutsi).

term genocide is most commonly thought of in terms of extermination via killing, the international community has recently recognized violent sexual acts, not necessarily resulting in death, to constitute genocide.³

This note will explore the treatment of the two primary violent sexual acts, rape and forced pregnancy, in modern international criminal law; more specifically in its treatment as genocide. The woman as an individual is the primary sufferer of sexual violence during armed conflict, however sexual violence is a calculated means by which perpetrators seek to destroy an entire ethnic group.⁴ Sexual violence is *both* an attack against the woman and an attack against the ethnic group, and should be prosecuted as such. While crimes against individuals are best prosecuted as crimes against humanity or under domestic law, crimes committed against ethnic groups, separate from the individual underlying act, should be prosecuted as genocide.

The use of sexual violence to destroy an unwanted group, as an official policy of war, is unconscionable.⁵ Yet in both the conflicts in Yugoslavia and Rwanda, sexual violence against women was used to “humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group.”⁶ These activities were genocidal in nature because they were not solely acts directed at harming women, but were instead used to accomplish ethnic cleansing and occurred with great frequency.⁷ In Yugoslavia, for example, while rampant sexual violence was an underlying crime directed against women, the perpetrators intended these violations on both “her body and its reproductive capabilities [to be] a ‘weapon of war’” against the ethnic group.⁸ In fact, these attacks were part of a larger systematic and strategic plan of Serbian leaders to execute its “policy of ethnic cleansing or genocide . . . to create a ‘Greater Serbia’: a

In Yugoslavia, “genocide and ethnic cleansing coincided, the goal being the establishment of a greater Serbia—that is, a Serb-inhabited region purged of all non-Serbs throughout Serbia, Bosnia-Herzegovina, and Croatia. Within the Bosnian, Muslim, and Catholic communities, sexual assault and rape served as particularly effective means of achieving this goal.” Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 355 (1998).

3. See Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4-T, Sept. 2, 1998, available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

4. The term “ethnic group” is used to include groups that are bound together by a common national, ethnical, racial, or religious heritage.

5. Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2570 (2001).

6. *Id.*

7. *Id.*

8. Salzman, *supra* note 2, at 349.

religiously, culturally, and linguistically homogenous Serbian nation.”⁹ This was *not*, from the prospective of the perpetrators, solely an attack against the individual woman or the female gender.

Critics argue that grouping the two crimes—genocide and rape—together as *genocidal rape* is dangerous because they are two separate atrocities.¹⁰ Both crimes “are based on total contempt for and dehumanization of the victim. . . . But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again.”¹¹ The fear voiced, which emerges out of the age-old ignorance of rape as a crime during times of conflict, is whether, when the war is over, “the crimes against women, the voices of women, and their struggles to survive will be vindicated?”¹² This question, for purposes of this discussion, is best answered when put in the hands of prosecutors of sexual violence.

The prosecution of sexual violence presents numerous and difficult decisions for counsel. For example, while the perpetrator may incorporate rape, forced impregnation, or other sexually violent acts into its overall policy of ethnic cleansing—which is at its core a crime of genocide¹³—prosecutors should not limit the indictment to only prosecuting for genocide. Instead, charges for the individual crimes that fall for example, under crimes against humanity, should also be brought. Although some critics contend that “the act of forced impregnation should be prosecuted as a crime of genocide rather than under the umbrella of other war crimes,”¹⁴ it is still better for prosecutors, in an age when much of the law is new, to develop and prosecute this crime under various theories, including crimes against humanity, genocide, and war crimes when applicable. Likewise, in answer to concerns about grouping “separate atrocities” into one—genocidal rape—the prosecutors should include as many counts and theories as possible in order to test the boundaries of the practical law in determining how sexual violence should be legally understood. The real problem with terms such as genocidal rape, is that with their use we tend to condense instead of expand the possibilities for prosecution.

Part II of this note is an examination of genocide, as it pertains to sexual violence, and how it differs from the more common charge of

9. *Id.*

10. Frances T. Pilch, *The Crime of Rape in International Humanitarian Law*, 9 USAFA J. LEGAL STUD. 99 (1998) (quoting Rhonda Copelon, *Surfacing Gender*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 205 (Alexandra Stiglmayer ed., 1994)). “Genocide—the effort to destroy a people based on its identity as a people—evokes the deepest horror and warrants the severest condemnation. Rape is sexualized violence that seeks to humiliate, terrorize, and destroy a woman based on her identity as a woman.” *Id.* at 111.

11. *Id.* at 111–12.

12. *Id.* at 112.

13. Siobhán K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 94 (1996).

14. *Id.*

crimes against humanity. Part III provides an in-depth analysis of sexual violence as genocide, examining rape and forced pregnancy through a variety of lenses, and in light of the recent International Criminal Tribunal for Rwanda (ICTR)¹⁵ case, *Prosecutor v. Akayesu*. Part IV focuses on the recently adopted, and currently in force, Rome Statute of the International Criminal Court. The examination will draw on the Rome Statute as a guide for the furtherance of prosecution and classification of sexual violence as genocide generally, because it is not as specific in focus as the ICTY and the ICTR.

I. GENOCIDE

As mentioned, the term genocide evokes thoughts of the systematic murdering of individuals. However genocide is more appropriately viewed as an attack on an ethnicity, rather than on an individual.¹⁶ Article II of the Genocide Convention, which includes the language of both Article 4 of the ICTY¹⁷ and Article 2 of the ICTR,¹⁸ reads as follows:

In the present Convention, genocide means any of the following acts committed with *intent to destroy, in whole or in part, a national, ethnic, racial or religious group*, as such:

- (a) Killing members *of the group*;
- (b) Causing serious bodily or mental harm to members *of the group*;
- (c) Deliberately inflicting *on the group* conditions of life calculated to bring about *its physical destruction* in whole or in part;
- (d) Imposing measures intended to prevent births *within the group*;
- (e) Forcibly transferring children *of the group* to another group.¹⁹

The intent requirement to prosecute a sexual crime under the genocide statute is very different from that of domestic law. When the underlying offense is rape or forced pregnancy, in order for the crime to

15. International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598–1604 [hereinafter ICTR].

16. Attacks on the individual, in contrast to attacks on the ethnicity, are more appropriately prosecuted under domestic law, if possible, or as crimes against humanity.

17. International Criminal Tribunal for Yugoslavia, May 25, 1993, 32 I.L.M. 1192–95 [hereinafter ICTY].

18. ICTR, *supra* note 15.

19. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. II, 78 U.N.T.S. 277 (entry into force Jan. 12, 1951) [hereinafter Genocide Convention] (emphasis added).

be categorized as genocide, the intent to destroy the group must accompany the intent to commit the underlying offense.²⁰ Therefore, in *mens rea* terms, only “when persecution escalates to the extreme form of wilful [sic] and deliberate acts designed to destroy a group or part of a group, [can it] be held that such persecution amounts to genocide.”²¹ Regardless of how widespread the individual attacks are, the charge of genocide is ineffective *without* the intent to destroy the group.

Genocide is also distinct from crimes against humanity. Crimes of genocide must be committed against members of a specific group, whereas “crimes against humanity can be committed against any individual—or, to be more precise, any civilian—and the criminal against humanity need not intend to destroy the civilian population targeted by the attack.”²² Several differences between genocide and crimes against humanity are worth noting. First, as stated above, the intent requirement, or *mens rea* is different between the two. The perpetrator “of genocide must intend to destroy all or part of a protected group, while the perpetrator of a crime against humanity need not have such intent.”²³ Second, to be prosecuted as genocide, the underlying offense must have at least a remote chance of “contribut[ing] to the complete or partial destruction of the victim’s group. To that extent, more underlying offenses may qualify as crimes against humanity rather than genocide.”²⁴

Third, the charge of genocide does not require that the acts occur during an armed conflict or “‘widespread or systematic attack against a civilian population.’ An act of genocide could be planned or committed on a large scale, or committed as an individual undertaking.”²⁵ The language of the ICTY and ICTR statutes require only that the genocidal

20. Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 295–96 (2002).

21. *Id.* at 296 (citing Prosecutor v. Kupreški, Case No. IT-95-16, Judgment, ¶ 636 (Jan. 14, 2000)). “In essence, genocide differs from persecution in that in the case of genocide, the perpetrator chooses his victims because they belong to a specific group *and* seeks to destroy in whole or in part this very group.” *Id.*

22. *Id.* at 315.

23. *Id.* at 303. Unfortunately, the female gender is not a protected group under the definition of genocide, though it certainly should be added in the future. Instead, women are protected under genocide law as members of a protected ethnic group.

24. *Id.* at 303–04;

Both genocide and crimes against humanity contain an intrinsic element of scale. . . . However, whereas the scale of crimes against humanity is assessed on the basis of the widespread or systematic nature of the attack, the scale of genocide is assessed on the basis of its effect upon the targeted group, the destruction of which is being pursued.

Id.

25. *Id.* at 304.

acts to be “committed with intent to destroy.”²⁶ Crimes against humanity on the other hand, must be committed during armed conflict or as part of a widespread or systematic attack.²⁷ Fourth, crimes of genocide can be committed against *any* individual, whether civilian or combatant, while crimes against humanity “may only be committed against ‘civilians.’”²⁸ Lastly, whereas under the ICTY “crimes against humanity may be committed against any individual, genocide can only be committed against individuals who belong to specifically protected groups characterized by their national, ethnical, racial, or religious identity.”²⁹ The requirements for genocide, therefore, create a limited and more concise group of crimes, based largely on the intent of the perpetrator to destroy a national, ethnical, racial, or religious group.

II. SEXUAL CRIMES AS GENOCIDE

Historically, international legal jurisprudence did not consider crimes of sexual violence as “equivalent in status to other acts of violence and inhumanity constituting crimes against the world community as a whole.”³⁰ Acts of sexual violence were commonly “designated as moral crimes and outrages on honor, a classification that tended to focus on perceived violations of the victim’s honor or dignity, rather than the physical and mental trauma brought about by an assault.”³¹ It was not until the ICTY and the ICTR that the international community recognized the severity of these crimes and their impact upon the victims.

Genocide is often thought of as the most serious international crime. Ethnic cleansing, a contemporary form of genocide, involves “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.”³² As critics recognize, “[e]thnic cleansing is accomplished through the use of ‘concentration camps, torture, sexual violence, mass killings, forced deportations, destruction of private and cultural property, pillage and theft, and the blocking of

26. ICTY, *supra* note 17, art. 4(2); ICTR, *supra* note 15, art. 2(2).

27. ICTY, *supra* note 17, art. 5 (“crimes when committed in armed conflict”); ICTR, *supra* note 15, art. 3 (“crimes when committed as part of a widespread or systematic attack”).

28. Mettraux, *supra* note 20, at 304.

29. *Id.* The ICTR requires that the attack be “against any civilian population on national, political, ethnic, racial or religious grounds,” which is still a looser group requirement than that for genocide. See ICTR, *supra* note 15, art. 3.

30. Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 627 (2001).

31. *Id.*

32. Salzman, *supra* note 2, at 354 (quoting Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, Annex 1, ¶ 129, U.N. Doc. S/1994/674 (1994)).

humanitarian aid.’”³³ This Part will explore the two primary means of accomplishing ethnic cleansing and genocide through sexual violence: rape and forced pregnancy. This Part will also examine the recent conviction of Jean-Paul Akayesu under the ICTR for genocide via sexual violence.³⁴

A. How Rape Functions as a Method of Genocide

The sexual atrocities of Yugoslavia and Rwanda are commonly discussed “as rape or as genocide, not as what they are, which is rape as genocide—rape directed toward women because ...” of their nationality, ethnicity, race or religion.³⁵ Understanding the importance of linking sexual violence and genocide in international criminal jurisprudence requires an examination of how rape functions as a method of genocide.

It is necessary to recognize rape in the manner that perpetrators view it:³⁶ as “an effective method of isolating and humiliating women and men of the same culture. This isolation achieves effective genocide as it ... may mark women as ‘spoiled’ and unsuitable for traditional marriage and family life.”³⁷ Rape has a chilling effect on the normative relations between a man and woman who might choose to procreate, an affect that was recognized and utilized by perpetrators of genocide in both Yugoslavia and Rwanda.

In Yugoslavia, the Serbs specifically utilized rape as an instrument of war for many reasons.³⁸ Chief among them are the creation of cultural damage and the infliction of physical damage. First, within Muslim culture and under “Islamic law, significant stigma attaches to victims of sexual violence. This stigma breaks up families, ostracizes victims, and in some cases, leads to the murder of victims by their family or communities. In many Muslim communities, rape victims are perceived as undesirable, soiled, and unfit for marriage.”³⁹ Furthermore, the response of normative culture “to women who have been raped could result in the prevention of births:

33. *Id.* (quoting M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA* 5 (1996)).

34. Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4-T, Sept. 2, 1998, available at <http://www.icttr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

35. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 9 (1994).

36. For example, in “Yugoslavia, both the number and nature of the sexual assaults indicate the integral role rape played in the ethnic cleansing of Muslims by Serbian forces.” Campanaro, *supra* note 5, at 2571.

37. Sarnata Reynolds, *Detering and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 606–07 (1998) (citing Ruth Seifert, *War and Rape: A Preliminary Analysis*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 54, 59–60 (Alexandra Stiglmayer ed., 1994)).

38. Campanaro, *supra* note 5, at 2571.

39. *Id.*

unmarried women will not be married within the community, or those who are married may be rejected by their husbands. In either case, reproduction is impaired within a specific community.”⁴⁰ This prevention of births accomplishes the primary objective of the genocidal perpetrator: “Imposing measures intended to prevent births within the group.”⁴¹

Second, the possibility of physical and psychological damage to the individual victim is also significant to the ethnic group as a whole. Primary among the concerns are instances where the female victim has suffered physical injuries to the point that she is unable to procreate.⁴² The physical elimination of the ability to procreate goes farther than the cultural impact of rape. Physical damage transcends ethnic norms and cultural impairments, thus affecting the ability of any impacted group to procreate regardless of cultural or religious beliefs. In that vein, rape is also used as a method of introducing or spreading disease to an ethnic group. Perpetrators of genocide can use rape to spread mortal diseases, such as HIV/AIDS, or other sexually transmitted diseases, through unwitting victims, to the ethnic groups, especially in regions with limited technology to detect such diseases.

The purpose of genocide is to destroy an ethnic group, not necessarily to commit the underlying offense. To accomplish that feat, perpetrators of genocide turn to rape to accomplish both immediate and long-lasting atrocities upon the group. Rape, when used for genocidal purposes, certainly “leaves physical and mental scars on victims long after the violence has taken place. Ultimately, it may serve to destroy families, communities, and entire cultures,”⁴³ which was the intent of the perpetrators in Yugoslavia and Rwanda.

B. How Forced Pregnancy Functions as a Method of Genocide

Forced pregnancy is the more complicated of the two primary methods of genocidal sexual violence.⁴⁴ While it seems “counterintuitive that impregnation, the creation of new life, can in fact be an instrument of

40. Salzman, *supra* note 2, at 375.

41. Genocide Convention, *supra* note 19, art. II; ICTY, *supra* note 17, art. 4(d); ICTR, *supra* note 15, art. 2(d).

42. Salzman, *supra* note 2, at 375 (“the genocidal objective is clearly accomplished” when the possibility for reproduction is eliminated).

43. Pilch, *supra* note 10, at 101 (citing Susan Brownmiller, *Making Female Bodies the Battlefield*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 180, 181 (Alexandra Stiglmayer ed., 1994)).

44. Forced impregnation and forced pregnancy often go hand-in-hand when the intended outcome is to force a woman to bear a child of a different ethnicity. Forced impregnation, in its simplest terms, is the impregnating of a woman against her will, whether by rape or other medical means. Forced pregnancy, in these circumstances, is the detention of the impregnated woman past the point at which the pregnancy can be terminated safely.

genocide. . . . [F]orced impregnation—interference with autonomous reproduction—can destroy a group.”⁴⁵ The interference forced pregnancy or impregnation causes are numerous and the impact is felt by different victims. First, psychological trauma can cause a woman to be “unable to have normal sexual or childbearing experiences with members of [her] own group.”⁴⁶ Under functionalist logic, the impact is on both the individual woman, who is unable to function in that specific sense within normative society, and the ethnic group that loses the benefit of the woman’s procreative function. Second, in certain societies, a woman who is raped and bears “the children of the aggressors may no longer be marriageable in the[] society.”⁴⁷ This impacts on both the individual woman, who is rejected by her normative society, and on the ethnic group, which loses the benefit of accepting the woman. Third, and more pragmatically, a woman who is pregnant with the child of a perpetrator is physically unable to bear a child not conceived of sexual violence.⁴⁸ In a utilitarian sense, the act of forced pregnancy negatively impacts both the woman and the ethnic group by prohibiting the utilization of the womb for procreation, which is the intent of the perpetrator.

While it seems dehumanizing to view an act of sexual violence against an individual woman in terms of functionality, utility, and group benefit, it is unrealistic not to incorporate such analyses into the examination. Both the intent of the perpetrators and the result of the sexual violence must, to some extent, determine the categorization of the crime.⁴⁹ When a perpetrating group calculates to destroy a victim group by these means, having, for example, the clear intent to remove important members from functioning within the group with the intended effect of lowering the birthrate, it is irresponsible not to also view and prosecute the sexual violence in those terms: as genocide.

45. Fisher, *supra* note 13, at 93.

46. *Id.*

47. *Id.*

48. *Id.*

49. For example:

In a traditionally patriarchal society, the Serbian government, military, and Orthodox church have explicitly formulated a perception of the female gender and its role and function within society. Essentially, the female is reduced to her reproductive capacities in order to fulfill the overall objective of Serbian nationalism by producing more citizens to populate the nation. Limiting womanhood to a single physiological quality in this way proves nondiscriminatory in that not only are Serbian women thus perceived, but non-Serbian women are as well. This attitude has certainly had an impact, conscious or unconscious, on the overall perception and treatment of women, playing a part in the establishment of rape camps and the usurpation of women’s bodies to achieve ethnic cleansing.

Salzman, *supra* note 2, at 349.

Forced pregnancy is accomplished by impregnating a woman, whether by rape or other medical means, with the sperm of a man of a different ethnicity. The perpetrator then detains the woman past the point at which the pregnancy can be safely terminated.⁵⁰ An example of this, from Yugoslavia, came to light when a “woman, detained at a rape camp in the northern Bosnian town of Doboï, reported that women who became pregnant had to remain in the camp for seven or eight months. Gynecologists examined the women and those women found pregnant were segregated from the rest and received meals and other ‘special privileges.’”⁵¹ Only after the last point at which the pregnancy could be terminated safely were the women released from confinement.⁵²

In Yugoslavia, the desire of the perpetrators of forced pregnancy was to “dilute” the Muslim population. According to critics of the effectiveness of forced pregnancy in ethnic cleansing, the method is only conceivable if “one denies both science and culture. Biologically, the fetus shares an equal amount of genetic material between the non-Serb mother and the Serbian father. Culturally, unless that child is raised by the father within a Serbian community, he or she will assimilate the cultural, ethnic, religious, and national identity of the mother.”⁵³ However, “[u]nder Islamic and Muslim law, a child’s ethnicity is determined by that of the father, so children born of these sexual assaults, committed by the Serb men, would not be considered Muslim or of their mother’s ethnicity.”⁵⁴

50. For example:

The frequently reported intent of Serbian soldiers to impregnate Muslim and Catholic Croats, the presence of gynecologists to examine the women, and the intentional holding of pregnant women until it was too late to legally or safely procure an abortion all point to a systematic, planned policy to utilize rape and forced impregnation as a form of ethnic cleansing.

Id. at 359 (citing Alexandra Stiglmayer, *The War in the Former Yugoslavia*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZGOVINA* 82, 119 (Alexandra Stiglmayer ed., 1994)).

51. *Id.* (citing Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, 17 *HUM. RTS. Q.* 651, 657 (1995) and Alexandra Stiglmayer, *The War in the Former Yugoslavia*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZGOVINA* 82, 119 (Alexandra Stiglmayer ed., 1994)).

52. *Id.* (citing Alexandra Stiglmayer, *The War in the Former Yugoslavia*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZGOVINA* 82, 118–19 (Alexandra Stiglmayer ed., 1994)).

53. *Id.* at 364 (citing BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZGOVINA AND CROATIA* 96–97 (1996) (stating that “Serb ‘ethnic cleansing’ by means of rape, enforced pregnancy, and childbirth is based on the uninformed, hallucinatory fantasy of ultranationalists whose most salient characteristic, after their violence, is their ignorance.”)).

54. Campanaro, *supra* note 5, at 2571.

This raises the important question of whether to evaluate forced pregnancy the same in matrilineal and patrilineal societies.⁵⁵

Theoretically,⁵⁶ forced pregnancy can only be practical and effective in a patrilineal society.⁵⁷ In that situation, society disregards the mother's heritage and nurturing, and labels the child of forced pregnancy with the father's ethnicity. For example, in Yugoslavia, which is a patrilineal society,⁵⁸ "the family name passes on through the male, regardless of religion or ethnicity. Even though biologically the child shares an equal amount of genetic material from [both the mother and father], this fact does not overcome the sense that a child born from rape by a Serb will always be considered Serbian."⁵⁹ While this "genetic and cultural patriarchal myth [] is indeed ignorant . . . the acceptance of this myth is not limited to Serbs, but is supported by Muslim and Catholic men and women as well. The idea that the male determines a child's ethnic identity is crosscultural and common, though misinformed."⁶⁰

The ability of perpetrators to use forced pregnancy as a means of accomplishing genocide requires a belief in the genetic myth of race and ethnicity. Forced pregnancy as a method of genocide "depends not only upon the perpetrators buying into the genetic and cultural myth, but the victims, their families, and their communities accepting the myth as well.

55. For specific descriptions of unilineal descent groups, see Department of Anthropology, *Unilineal Kinship and Descent*, University of Manitoba Faculty of Arts, at <http://www.umanitoba.ca/anthropology/tutor/descent/unilineal/unilin.html>. "Patrilineal, or agnatic, descent is established by tracing descent exclusively through males from a founding male ancestor." *Id.* at <http://www.umanitoba.ca/anthropology/tutor/descent/unilineal/patri01.html>. "Matrilineal, or uterine, descent is established by tracing descent exclusively through females from a founding female ancestor." *Id.* at <http://www.umanitoba.ca/anthropology/tutor/descent/unilineal/matri01.html>. It is also important to note that certain societies or groups subscribe to a belief in hypodescent, more commonly referred to as the "one-drop rule." See KATYA GIBEL AZOULAY, *BLACK, JEWISH AND INTERRACIAL: IT'S NOT THE COLOR OF YOUR SKIN, BUT THE RACE OF YOUR KIN* (1997).

56. This discussion is limited to a generalized macro-anthropologic analysis. The various cultures of the world are too diverse and dynamic for a micro-analysis to be practical in this article. It should also be noted that in undertaking this discussion, a certain amount of cultural relativism is necessary to judge the true impact of certain acts on an ethnicity within the definitional framework of Article II of the Genocide Convention.

57. In a matrilineal society the ethnicity of the mother, rather than the father, is passed through the offspring. Therefore, the ethnicity of a rapist, for example, would not have as great an impact. Matrilineal societies are very rare and forced pregnancy as genocide has not arisen in such cultures; only time will tell.

58. Authors commonly misuse the term "patriarchal" in place of patrilineal. Patrilineal refers to the line of heritage, which is of importance here, whereas patriarchal refers to a normative social order.

59. Salzman, *supra* note 2, at 364–65 (citing Stacy Sullivan, *Born Under a Bad Sign*, *NEWSWEEK*, Sept. 23, 1996, at 50).

60. *Id.* at 364 ("No matter how much one argues against such a perspective, a person's (mis)perceptions often dictate both how he perceives reality and his concrete practices, regardless of the facts.").

As demonstrated by the response of Catholic and Muslim women who refer to their fetuses as 'filth' and 'that thing,' the Serbs are not the only group who accept this myth."⁶¹ Perpetrators accomplish the goal of genocide when the culture of the mother rejects the child born of forced pregnancy. For example, "if the child is brought up in the Muslim or Catholic culture [and it is recognized that the baby's father is Serbian] he or she will oftentimes not be assimilated entirely within that culture given the circumstances of conception."⁶² In cases of forced pregnancy, "children have been considered by both Serbs and non-Serbs to carry the father's genealogy, thus allowing the Serbs to transfer what they perceive as 'their children' to the Muslim or Catholic group."⁶³ The result is "[c]ultural genocide . . . because the presence of these children and the knowledge of the circumstances under which they were conceived causes strife and resentment within the community and serves as a constant reminder of Serbian oppression and violence."⁶⁴

Ethnicity, race and religion are all socially constructed, and can therefore be socially deconstructed regardless of contrary scientific information. Regardless of how ignorant the bases for the belief that forced pregnancy can dilute and destroy an ethnicity, the intention of the perpetrators and the effectiveness of the crime's impact on the victim group require international prosecution for forced pregnancy as genocide.

C. *Prosecutor v. Jean-Paul Akayesu*

The issue of sexual violence as genocide came to a head with the prosecution of Jean-Paul Akayesu under the ICTR.⁶⁵ Akayesu served as a bourgmestre⁶⁶ for the Taba commune in Rwanda, from April 1993 until

61. *Id.* at 364–65 (citing Stacey Sullivan, *Born Under a Bad Sign*, NEWSWEEK, Sept. 23, 1996, at 50).

62. *Id.* (citing Stacey Sullivan, *Born Under a Bad Sign*, NEWSWEEK, Sept. 23, 1996, at 50).

63. *Id.* at 375.

64. *Id.*

Reports that pregnant Muslim and Catholic women were released from detention camps and sent to Serbia to give birth to "Serbian children" further helps to propagate the Serbian population, as the "Serbian child" is not considered tarnished by the mother's genes in Serbia as it is with the father's genes in Catholic or Muslim Croatia.

Id. at 375–76.

65. Akayesu was arrested on October 10, 1995 and his trial began on January 9, 1997. Judgment was entered on September 2, 1998.

66. This position is one of great local power. A bourgmestre is charged with the responsibility of maintaining law and order in the commune. As the Indictment explained:

Rwanda is divided into 11 prefectures, each of which is governed by a prefect. The prefectures are further subdivided into communes which are

June 1994. During the civil war, displaced civilians, the majority of whom were Tutsi, sought refuge in the Taba bureau communal under the protection of Akayesu. However, Akayesu, a Hutu, "facilitated [against Tutsis] the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises."⁶⁷ Akayesu stood trial for this and many other gruesome acts. The Indictment charged Akayesu with fifteen counts of genocide and crimes against humanity.

When Akayesu first came to trial it was common "to hear the assertion that genocide is killing, not rape, and that the women who were raped and survived were lucky they were not dead. Indeed, . . . 'there [was] a widespread perception among the Tribunal investigators that rape is somehow a 'lesser' or 'incidental' crime not worth investigating.'"⁶⁸ However, the judgment of the Chamber in *Akayesu*, while being significant in its conviction of Akayesu for genocide, is additionally important for its prosecution of gender-based crimes under international criminal law.⁶⁹ First, the Trial Chamber "recognized sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence."⁷⁰ Second, the Chamber "enunciated a broad, progressive international definition of both rape and sexual violence."⁷¹ The Chamber, "[b]y emphasizing the suffering imposed on the

placed under the authority of bourgmestres. The bourgmestre of each commune is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*. . . . As bourgmestre, Jean Paul Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

Prosecutor v. Jean-Paul Akayesu, Indictment, ICTR-96-4-I, ¶¶ 2, 4, available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm>.

67. *Id.* at ¶ 12B. The Indictment further recognized that "[b]y virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities." *Id.*

68. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 224 (2000) (quoting Human Rights Watch, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 94 (1996), available at <http://www.hrw.org/reports/1996/Rwanda.html>).

69. Kelly Askin, *News from the International Criminal Tribunals*, 7 HUM. RTS. BR. 16 (1999).

70. *Id.* (citing *Akayesu*, Judgment, ¶¶ 416–60).

71. *Id.* (citing *Akayesu*, Judgment, ¶¶ 416–60).

women as well as its role as a tool of their destruction and the destruction of the group, . . . took a significant step in recognizing women both as subjects in themselves and as part of their ethnicity.”⁷² *Akayesu*, therefore, is an important guiding light for international criminal jurisprudence in the area of sexual violence, especially for the crime of genocide.

1. The Finding of Guilt

The prosecution charged *Akayesu* with the crime of genocide in Count 1 of the Indictment, punishable under Article 2(3)(a) of the ICTR, which lists genocide as a punishable act. “Count 1 made no specific reference to sexual violence or rape. However, among the definitions of genocide offered by Article 2(2) is ‘causing serious bodily or mental harm to members of [a] group.’”⁷³ The Tribunal chose *sua sponte* “to consider sexual violence in connection to Count 1 and the allegations made in paragraphs 12(A) and 12(B) of the Indictment.”⁷⁴ The Chamber reasoned that the acts of rape and sexual violence contained in the Indictment constituted genocide in the same way as any other act listed under ‘Genocide’ Article 2(2) of the ICTR Statute, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, in this case the Tutsi.⁷⁵

The Chamber, in its judgment, “noted that witnesses testified that ‘even pregnant women, including those of Hutu origin, were killed on the grounds that the fetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father’s group of origin.’”⁷⁶ Another witness “testified that *Akayesu* had made a public statement to the effect that ‘if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order for the pregnancy to be aborted.’”⁷⁷ The Chamber found that the sexually violent acts “described by witnesses were perpetrated solely against Tutsi women, many of whom were subjected to the worst public humiliation, being mutilated and raped several times, often in public, in the Bureau Communal premises or in other public places, and frequently by more than one assailant.”⁷⁸ Additionally, the Chamber held that “[r]ape and sexual violence . . . constitute inflictions of ‘serious bodily and mental harm’ on victims.”⁷⁹ The Justices, given the

72. Copelon, *supra* note 68, at 227.

73. Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT’L. L. 517, 535–536 (1997).

74. *Id.*

75. *Id.* at 536 (quoting *Akayesu*, Judgment, ¶ 485).

76. *Id.* at 531 (quoting *Akayesu*, Judgment, ¶ 121).

77. *Id.* (quoting *Akayesu*, Judgment, ¶ 121).

78. *Id.* at 536 (citing *Akayesu*, Judgment, ¶ 731).

79. *Id.* (quoting ICTR, *supra* note 15, at art. 2(2)(b)).

overwhelming evidence, concluded that “these rapes ‘resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.’”⁸⁰ The actions described by the witnesses, therefore, met the requirements for underlying acts under Article 2 of the ICTR.

After determining the impact of the sexual violence and its relevance to the statute and charges, the Chamber turned to the actions of Akayesu. The Chamber “found that Akayesu had ‘aided and abetted’ the acts of sexual violence by allowing them to take place in his presence on, or near, the premises of the bureau communal and by ‘verbally encouraging’ the commission of these acts.”⁸¹ This decision was based on Akayesu’s abuse of power and position within the community. In fact, the Chamber “stated that because of his position of authority, his open encouragement was a clear signal of official tolerance for sexual violence, which would not have happened if he had not done so.”⁸² The Chamber therefore “concluded that the acts alleged in paragraphs 12A and 12B of the Indictment and subsequently proven at trial constitute the crime of genocide for which it found Akayesu individually criminally responsible.”⁸³

2. Definitional Guidance

The Chamber announced its definitions for rape and sexual violence within the sections of the *Akayesu* judgment concerning crimes against humanity. Those definitions, however, are relevant to the Chamber’s determination of whether rape or sexual violence—the underlying acts—occurred for purposes of the genocide charges. The Chamber’s judgment, which was accepted by subsequent ICTR trial chambers,⁸⁴ “defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence[,] which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”⁸⁵ The Chamber went further to explain its view on the nature and application of rape and sexual violence:

80. *Id.* (quoting *Akayesu*, Judgment, ¶ 731).

81. *Id.* (quoting *Akayesu*, Judgment, ¶ 724).

82. *Id.* (citing *Akayesu*, Judgment, ¶ 141).

83. *Id.* (citing *Akayesu*, Judgment, ¶ 731).

84. See *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, ICTR 95-1-T (May 21, 1999), available at <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>.

85. *Akayesu*, Judgment, ¶ 598.

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁸⁶

The Chamber then linked these definitions of criminal acts to the charge of genocide:

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.⁸⁷

86. *Id.* ¶ 597.

87. *Id.* ¶ 731.

The Chamber found that the “rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them . . . [a]s part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi. . . .”⁸⁸ Under this system, the leaders presented Tutsi women as sexualized and dehumanized objects for the Hutu perpetrators to abuse.⁸⁹ The Tutsi women were, to the perpetrators, the objectification of the Tutsi ethnic group, the destruction of which was accomplished through sexual violence. The Chamber concluded that “[t]his sexualized representation of ethnic identity graphically illustrates that [T]utsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself.”⁹⁰ Therefore, the rape and sexual violence conducted by the Hutu perpetrators against the Tutsi satisfied the statutory requirements for a finding of genocide, and the Chamber convicted Akayesu of, among other atrocities, genocide.⁹¹

3. Genocide Law After *Akayesu*: The Biological Function of the Group v. The Physical and Psychological Harm to the Woman

The Chamber in *Akayesu* recognized “that the constituent act of preventing births within the group includes measures such as forced sterilization, abortion, or birth control, as well as forced pregnancy where, in patriarchal societies, that represents an effort to affect ethnic composition by imposing the enemy’s ethnicity on the children of rape.”⁹² Additionally,

88. *Id.* ¶ 732.

89. *Id.*

90. *Id.*

91. *Akayesu*, Judgment, § 8 (“FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows: Count 1: Guilty of Genocide”).

92. Copelon, *supra* note 68, at 227–28. See *Akayesu*, Judgment, ¶ 507:

For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.

See also *Akayesu*, Judgment, ¶ 577:

These enumerated acts [include] . . . rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group

“[r]ape, with its potential to cause infertility or make sexual intercourse impossible, as well as its potential to render a woman psychologically or culturally unable to reproduce, may also qualify, as a measure intended to prevent births within the group.”⁹³ The *Akayesu* judgment, to that extent, appeared to recognize the connection between attacks on reproduction and the intent to commit genocide.

However, the Chamber in “*Akayesu* did not, as some had contended, emphasize the reproductive consequences as the hallmark of rape as a genocidal measure.”⁹⁴ Instead, the Chamber recognized rape and sexual violence “as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community.”⁹⁵ Proponents of the Chamber’s view of rape as sexual violence argue that first, “[t]o emphasize the reproductive impact on the community would threaten once again to reduce women to being simply the vehicles of the continuity of the targeted population.”⁹⁶ Second, “[i]t would also tend toward a biological as opposed to socially constructed view of identity as the value intended to be protected by the concept of genocide.”⁹⁷

These viewpoints are somewhat limited in their scope. First, to *not* emphasize the reproductive impact on the community would ignore the calculated intentions of the perpetrators of sexual violence to commit genocide. To ignore the effect that such actions have on the community is to ignore the cultural realities that exist when these actions are taken. It is therefore better to additionally categorize such actions under crimes against humanity or domestic law, which speak more directly to actions taken against the individual woman.⁹⁸ Second, this view does not tend toward a biological view of identity. What genocide law is meant to protect—racial, ethnical, and religious groups—are social constructs. The law’s protection of the biological ability to procreate is incidental to the protection of the ethnic group as a whole. It is naïve to denounce genocide law’s protection of the group’s right to exist, via its ability to procreate, when the intent of the perpetrators of genocide is to destroy the ethnic group by destroying its ability to procreate.

or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this article or any other crime within the jurisdiction of the Court. . . .

93. Copelon, *supra* note 68, at 228.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Akayesu was also convicted of crimes against humanity. See *Akayesu*, Judgment, § 8, (“Count 13: Guilty of Crime against Humanity (Rape):”).

III. THE ROME STATUTE AND THE FUTURE OF PROSECUTION OF SEXUAL VIOLENCE AS GENOCIDE

The future of prosecution of sexual violence as genocide can be found in the recently adopted Rome Statute of the International Criminal Court.⁹⁹ Article 6 of the Rome Statute mirrors the language of Article II of the Genocide Convention, Article 4 of the ICTY and Article 2 of the ICTR. The Rome Statute was drafted in the aftermath of the conflicts in Yugoslavia and Rwanda, and the structure of the Statute was therefore greatly influenced by the ICTY and ICTR.¹⁰⁰ However, unlike the ICTY and ICTR, which were set up to serve those specific conflict regions, the Rome Statute establishes the permanent International Criminal Court (ICC) with "the power to exercise its jurisdiction over persons for the most serious crimes of international concern."¹⁰¹ The jurisdiction of the ICC can be far reaching and is available for general application, unlike the ICTY or ICTR.¹⁰²

While it is too soon to tell exactly how effective the ICC will be, the Rome Statute provides important general definitions in the area of sexual violence. The Rome Statute, "along with the Rules of Procedure and Evidence and the Elements of Crimes, two subsidiary documents that will assist judges in interpreting the Statute, are the first international instruments to independently enumerate and define a range of sexual and reproductive crimes relating specifically to women and gender."¹⁰³ The Rome Statute and the Elements of Crimes are "the first international instruments to codify the elements of rape and to define and codify forced pregnancy."¹⁰⁴ The adoption of the Rome Statute "shifts the legal framework of sexual crimes . . . from assuming that the central legal harm is the

99. Rome Statute of the International Criminal Court, Jul. 17, 1998, 37 I.L.M. 999–1019, available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) (the Rome Statute entered into force on July 1, 2002) [hereinafter Rome Statute].

100. Boon, *supra* note 30, at 629.

101. Rome Statute, *supra* note 99, art. 1.

102. Rome Statute, *supra* note 99, art. 4(2) ("The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of *any* other State.") (emphasis added).

103. Boon, *supra* note 30, at 630 (citing Finalized Draft Text of the Rules of Procedure and Evidence, Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.1 (2000), available at <http://www.iccnw.org/documents/asp/ungovdocs/1stsession/RulesofProcEvidenceEng.pdf> [hereinafter Rules of Procedure and Evidence]; Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://www.iccnw.org/documents/asp/ungovdocs/1stsession/ElementsofCrimeEng.pdf> [hereinafter Elements of Crimes]).

104. *Id.* (citing Rome Statute of the International Criminal Court, Jul. 17, 1998, 37 I.L.M. 999–1019, art. 7(2)(f); Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.2 (2000), arts. 7(1)(g)–1, 7(1)(g)–4).

violation of honor, to considering the harms to the victim's bodily integrity and infringement of their agency."¹⁰⁵ The Rome Statute "is a watershed in international law and it will have a profound effect on the interpretation and status of sexual crimes in both domestic and international tribunals."¹⁰⁶

A. Definition of Rape

The Elements of Crimes sets forth the elements for finding the crime against humanity of rape under the Rome Statute:

- (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
- (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁰⁷

This definition, however, can be extended to find rape as the underlying crime of genocide under Article 6 of the Rome Statute, so long as the crime was "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."¹⁰⁸ The definition, therefore, is not solely for the purpose of prosecuting crimes against humanity, but aids in identifying the underlying crime of genocide.

B. Definition of Forced Pregnancy

The important definition that the Rome Statute provides, which was not provided by the ICTY or ICTR, is that of forced pregnancy. Under

105. *Id.* at 630–31.

106. *Id.* at 631.

107. Elements of Crimes, *supra* note 103, art. 7(1)(g)-1.

108. Rome Statute, *supra* note 99, art. 6. For example, if the acts of rape were deemed to be "imposing measures to prevent births within the group." *Id.*, art. 6(d).

the Statute, forced pregnancy is “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹⁰⁹ The proposal for this provision “took place against the backdrop of reports that emerged from Bosnia and Rwanda of systematic practices of raping women until they became pregnant, and then denying them access to medical facilities where they could terminate the pregnancies.”¹¹⁰ While there has yet to be a conviction under the ICTY or ICTR for forced pregnancy, theoretically forced pregnancy violates the genocide statute by forcing women “to carry and often give birth to babies of a different ethnic group [resulting in] severe mental and bodily harm.”¹¹¹ If the intent of the perpetrator falls within the requirements of Article 6, the effects of this suffering on the ethnic group¹¹² can bring about a conviction for forced pregnancy as genocide.

Note that the Rome Statute’s definition of forced pregnancy also includes a disclaimer: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”¹¹³ The purpose of the disclaimer is to avoid a requirement that countries alter their national laws to recognize the reproductive freedom of “women who have been raped, assaulted, or otherwise impregnated.”¹¹⁴ The disclaimed ensures “that forced pregnancy will not be used to supplant anti-abortion laws or endanger Catholic hospitals that refuse to provide abortions to women who become pregnant through rape.”¹¹⁵

The following is an examination of the three parts of the definition of forced pregnancy under the Rome Statute: (1) the unlawful confinement; (2) of a woman forcibly made pregnant; (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. Note that the “intent of affecting the ethnic composition of any population” speaks directly to crime of genocide under Article 6.¹¹⁶ This definition is certainly a solid foundation for future developments in the prosecution of forced pregnancy as genocide.

109. Rome Statute, *supra* note 99, art. 7(2)(f).

110. Boon, *supra* note 30, at 656 (citing CTR. FOR REPROD. LAW & POLICY, RAPE AND FORCED PREGNANCY IN WAR AND CONFLICT SITUATIONS: STARK VIOLATIONS OF WOMEN’S REPRODUCTIVE AND SEXUAL SELF DETERMINATION 2 (1999)).

111. *Id.* at 660.

112. See discussion *supra*, Part III(B).

113. Rome Statute, *supra* note 99, art. 7(2)(f).

114. Boon, *supra* note 30, at 666.

115. *Id.* at 659 (citing Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 368 (Roy S. Lee ed., 1999)).

116. Article 6 of the Rome Statute, like Article II of the Genocide Convention, defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . .”

1. The Unlawful Confinement

The definition of forced pregnancy under the Rome Statute requires that the woman “be detained or confined during the time she is pregnant.”¹¹⁷ While the term confinement “is not defined in the legal instruments of the ICC, . . . its essence is the restraint of liberty.”¹¹⁸ The definition does not, however, require that the woman be confined at the time she was forcibly impregnated or gave birth.¹¹⁹ Instead, the “critical period of confinement is between the time the woman is thought to be pregnant and the termination of the pregnancy, whether by giving birth, by miscarriage, by abortion, or by the limit permitted by local laws for obtaining an abortion.”¹²⁰

The “restraint on liberty” concept presents an interesting conundrum. While the definition explicitly states that the statute shall not affect national laws relating to pregnancy, it still appears that a person who rapes another with the intent to impregnate, in a country where abortions are prohibited, would be guilty of forced pregnancy. The laws prohibiting the woman from obtaining a safe abortion confine her to the pregnancy.¹²¹ If the perpetrator also commits this underlying act with the intention of destroying an ethnic group, the national laws prohibiting the abortion would make the prosecution of forced pregnancy as genocide easier because the prosecution would only be required to prove that the laws confined the woman, not necessarily that she was physically constrained by the perpetrator.

2. Of a Woman Forcibly Made Pregnant

To prosecute under this definition, the threshold condition that the woman is forcibly made pregnant must be met.¹²² As is self-evident in the language, the woman must be physically pregnant; the definition is not broad enough to cover attempts to make her pregnant.¹²³ The definition of “forcibly,” however, is not so clear: “force or coercion, as demonstrated by ‘violence, duress, detention, psychological oppression or abuse of power’—are relevant to the crime of forced pregnancy as force is not synonymous with violence or physical acts.”¹²⁴ The use of force to

117. *Id.*

118. *Id.* at 662.

119. *Id.*

120. *Id.* at 662–63.

121. This assumes, as may be more likely than not in areas of civil strife, that the woman cannot easily travel abroad to have an abortion.

122. Boon, *supra* note 30, at 660.

123. *Id.*

124. *Id.* at 660–61.

impregnate is not “restricted to physical encounters but rather encompass[es] the effects of coercive circumstances as construed in the element of rape under the [Rome] Statute.”¹²⁵ Critics have argued that “[i]f a woman is not permitted to control her reproductive cycles by way of being ‘forcibly’ prevented from using contraceptives, for example, the acts could constitute evidence of a forced pregnancy.”¹²⁶ However, it is likely that rape or some other type of coercive action is taken by the perpetrator to create the possibility of pregnancy. In other words, in the case of Yugoslavia, it is unlikely that a Serbian perpetrator would be found to have committed forced pregnancy for prohibiting a Muslim woman from using birth control unless the possibility of pregnancy arose out of some type of force or coercion¹²⁷ related to the goal of impregnating the Muslim woman with Serbian sperm.

3. With the Intent of Affecting the Ethnic Composition of Any Population or Carrying Out Other Grave Violations of International Law

Under the definition of forced pregnancy, “the perpetrator must bring about the forced pregnancy with the intent to affect the ethnic composition of a population or to commit other grave violations of international law.”¹²⁸ The language of affecting the ethnic composition is a natural lead-in to a genocide charge. However, the two particularly relevant provisions of Article 6 are “(b) ‘causing serious bodily or mental harm to members of the group’ and (d) ‘imposing measures to prevent births within the group.’”¹²⁹

The Trial Chamber in *Akayesu* made mention in this area. The Chamber suggested “that forced pregnancies may also be considered as ‘measures intended to prevent births within the group’ under [the Rome Statute’s] . . . definition of genocide.”¹³⁰ The Chamber “wrote that these measures can be both mental and physical, as ‘rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.’”¹³¹ Furthermore, the Trial Chamber in *Musema* “held that paragraph (d) includes ‘sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females,

125. *Id.* at 661.

126. *Id.*

127. Rape, for example.

128. Boon, *supra* note 30, at 660.

129. *Id.* at 663 (quoting Rome Statute of the International Criminal Court, Jul. 17, 1998, 37 I.L.M. 999–1019, art. 6(b), (d)).

130. Boon, *supra* note 30, at 664 (quoting *Akayesu*, Judgment, ¶ 507). See Rome Statute, *supra* note 99, art. 6(d).

131. *Id.* at 664–65 (2001) (citing *Akayesu*, Judgment, ¶ 508).

and prohibition of marriages.' While forced pregnancy did not appear in this list, it is comparable to the bases recognized by the ICTR."¹³² There is a strong correlation between the elements of force and coercion used in forced pregnancy, and those enumerated in Article 6(d) of the Rome Statute.

C. *The Link Between Genocide and Rape/Forced Pregnancy*

Rape and forced pregnancy may be adjudicated under Genocide, the third major crime in the Rome Statute.¹³³ As mentioned, Article 6 of the Rome Statute mirrors the language of Article II of the Genocide Convention, Article 4 of the ICTY and Article 2 of the ICTR. In practice, however, "[d]espite the absence of a specific reference, the link between genocide and rape has been established by the ICTR. In both *Prosecutor v. Akayesu* and *Prosecutor v. Musema*, the ICTR trial chamber convicted the accused of genocide based in part on charges of rape."¹³⁴ The judgments in these two cases "suggest that acts of forced pregnancy may constitute genocide when the acts are committed with 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'"¹³⁵ Support for this assertion is found in "a footnote in the Elements of Crimes linking rape and sexual crimes to Article 6(b) on genocide by causing serious bodily or mental harm."¹³⁶

CONCLUSION

This note has examined the treatment of rape and forced pregnancy as genocide under modern international criminal law. Theorizing a conviction under the genocide statutes for sexual violence is difficult and requires sacrifice. Primary among those sacrifices, at least for purposes of genocide, are the conceptions of the woman as an individual and as a member of the female gender. Certainly these atrocities are committed almost solely against women, both individually and as a gender. However, for the prosecution of sexual violence as genocide there must be something different; there must be the intent to destroy an ethnic group. It is at this point, and I stress only for purposes of the genocide analysis, that the woman, as an individual and as a member of the female gender, must recoil into her ethnicity.

132. *Id.* at 665 (quoting *Prosecutor v. Musema*, Judgement and Sentence, ICTR-96-13-T, ¶ 158 (Jan. 27, 2000)).

133. Rome Statute, *supra* note 99, art. 6.

134. Boon, *supra* note 30, at 635-36.

135. *Id.* at 636.

136. *Id.* at 636 (citing Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 6 n.3).

It cannot be ignored that sexual violence is a calculated means by which perpetrators seek to destroy entire ethnic groups. These actions are both an attack against the woman and an attack against the ethnic group. However, for purposes of genocide, the appropriate impact to judge is the effect on the ethnic group. While crimes against individuals are best categorized as crimes against humanity or under domestic law, crimes committed against ethnic groups, separate from the individual underlying act, should be categorized as genocide. Until women as a gender are recognized as a protected group under the genocide statutes, their exclusive victimization will take a backseat to the victimization of the ethnic group for purposes of the genocide analysis. Sexual violence, therefore, should only be recognized under genocide law when the intent of the perpetrator in committing the underlying sexual act is to destroy, in whole or in part, a national, ethnic, racial, or religious group.

